***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# NO. 75-1154

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD ZUBER, et al.

On Appeal from the United States

District Court, Southern District of New York

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BRIEF OF DEFENDANT-APPELLANT,

EDWARD ZUBER

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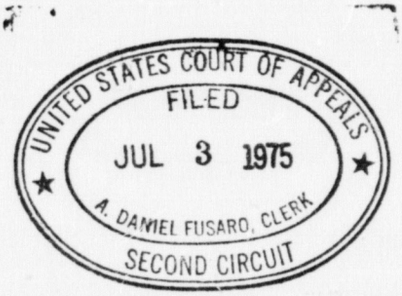


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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Statutes



Constitution



Rules

## THE ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in denying appellant's numerous motions for severance, which, if granted, would have allowed appellant the opportunity to utilize the highly exculpatory testimony of two co-defendants, who refused to testify unless a severance was granted?

2. Did the Trial Court err in denying a motion for judgment acquittal, when the evidence failed to establish that appellant was aware of the aims and purposes of the scheme with which he was charged?

3. Did the Trial Court err in restricting the cross-examination of key government witnesses?

4. Did the Trial Court err in denying appellant's motion to strike prejudicial and inflammatory surplusage in the indictment, when the evidence did not support the inflammatory allegations?

5. Did the Trial Court err in denying appellant's motions to dismiss the indictment for lack of speedy prosecution in light of a four year delay and the loss of the corporation's "due diligence" file?

## STATEMENT OF THE CASE

### 1. Nature of the Case.

Defendant-Appellant EDWARD ZUBER (hereinafter "appellant") appeals from a judgment of conviction entered on March 31, 1975, by United States District Judge Lloyd F. McMahon, sentencing appellant to serve a term of imprisonment of two and one-half years, after a jury trial before Judge McMahon had resulted in a verdict of guilty one one count of a multi-count indictment on December 12, 1974.

### 2. The Proceedings Below.

Indictment 74 CR 908 (LFM), in forty-six (46) counts, was filed in September, 1974, charging appellant and eight co-defendants, in thirty-one (31) counts. Appellant was not charged in the remaining fifteen (15) counts. On November 12, 1974, written motions were filed on behalf of appellant to sever the trial of defendant EDWARD ZUBER; to continue the trial; to suppress oral statements made by the defendant; to disclose electronic surveillance; to suppress evidence obtained from parallel SEC investigation; for a bill of particulars; to strike surplusage in the indictment; and to dismiss the indictment for lack of speedy prosecution. Without a hearing, Judge McMahon denied each of the motions. On the opening day of the trial,

December 2, 1974, appellant renewed each of his motions with particular emphasis on the severance motion (Reporter's Transcript 107 - 108).[1] The severance motion was accompanied by affidavits clearly demonstrating that the two primary co-defendants, Segal and Howard (also known as Finkelstein), would not testify at a joint trial, but would testify on behalf of appellant ZUBER if a severance were granted, and would provide testimony completing exculpating Mr. ZUBER. The court denied each of the motions again.

At the close of the government's case, appellant, for the third time, renewed his motion for severance, again setting forth the factual basis (R.T. 967 - 970). The trial court reserved judgment on the motion, indicating it was "premature" (R.T. 970). Additionally, at this time appellant made other motions. The government at this juncture moved to dismiss and abandon eleven (11) of the thirty-one (31) counts outstanding against appellant (R.T. 964).

After the presentation of the defense case, in which none of the co-defendants testified, and in which appellant called no witnesses, appellant renewed all of the motions previously made, thus raising the severance issue for the fourth occasion. Once again, the Court denied all of the

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1 References to the reporter's transcript will hereinafter be referred to as "R.T."

motions, stating with respect to the severance motion that, "You have not made sufficient showing." (R.T. 1021) This was in spite of the fact that the Court was provided with the specific testimony each of the co-defendants would provide, the manner in which it was exculpatory, and the fact that each would testify if a severance were granted.

After several days of deliberation, the jury found appellant not guilty on nineteen (19) counts, including the conspiracy charge. He was convicted on one (1) count charging a violation of 15 U.S.C. §77q and x (fraud in the sale of securities). On January 17, 1974, appellant made a written motion for judgment of acquittal and/or new trial on the grounds the government failed to disclose Brady material relating to its chief witness; the Court erred in denying the severance motion; the Court erred in charging the jury under the Pinkerton rationale that if a defendant joined a conspiracy he was liable for substantive crimes committed prior to his membership; cross-examination of prosecution witnesses was unduly restricted; insufficiency of the evidence; lack of speedy prosecution; and failure to strike prejudicial surplusage in the indictment. Judge McMahon denied the motion in a written opinion read from the bench on March 31, 1975.

Appellant is presently serving his sentence of imprisonment.

## STATMENT OF FACTS

### 1. The Offenses Charged in the Indictment.

Count 1 of the indictment charged a conspiracy, alleging that appellant and eight co-defendants, from August 1, 1968, to December 31, 1970, conspired to violate §§5 and 17a of the Securities Act of 1933, Rule 10b - 5 of the Securities Exchange Act of 1934, and the mail fraud statute.

Specifically, it was alleged, "The object of this conspiracy was to secure control of many thousands of shares of stock, never registered with the SEC, in an inactive "shell" corporation, namely Pioneer, then to establish an artificial market in the stock through manipulative devices, including quotes at arbitrarily selected prices, touting, giving assurances against loss, and directing trades, and then finally to sell, pledge and distribute this unregistered stock at artificially high prices, to purchasers and lenders in order to fraudulently obtain many hundreds of thousands of dollars at their expense." (Page 2, Indictment.)

The indictment further charged that defendant Acton would obtain control of Pioneer Development Corporation ("Pioneer"), a corporate "shell" with approximately 500,000 shares issued and outstanding; that defendants

Acton and Clegg would become Secretary and President of Pioneer, respectively; that Acton and Clegg would give defendant Segal in New York a large quantity of the stock to enable him to create an artificial market and to distribute it to the public. It was further alleged that Acton and Clegg would arrange to place assets of "insubstantial" value in Pioneer, so that Segal could misrepresent them to potential investors. It is also alleged that defendants Segal, Levine and Azzerone would manipulate and inflate the price of Pioneer stock through directed trades, assurances against loss, and false claims.

Appellant ZUBER was not charged with engaging in any of the foregoing activities, or of having had knowledge of them. However, it was charged that defendants Segal, Acton, Clegg, Howard, Scardino, McKibbon and ZUBER did distribute the stock to the public, and that defendants Scardino and McKibbon sold some of the stock in Denver, Colorado, the proceeds of which went to various persons including defendant ZUBER. It was also charged that defendant ZUBER acting on behalf of defendant Segal used threats of violence to recover the proceeds from the sale of stock by defendants Scardino and McKibbon in Denver.

Nowhere in the indictment is it alleged that there was an agreement between the participants not to sell the stock on the West Coast in order to provide Segal with a free hand to manipulate and distribute the stock on the

East Coast. The proof during the course of the trial demonstrated the existence of such an agreement, but certainly not that Mr. ZUBER was aware of its existence.

Counts 2 through 16 relate to the sale of unregistered securities and do not charge appellant ZUBER.

Counts 17 through 29 charge ZUBER and the co-defendants with violations of Title 15, U.S.C. §§77q and x (§17a of the Securities Act of 1933 -- fraud in the sale of securities).

Counts 17 through 27 charge appellant with substantive crimes which occurred prior to any contact he had with this case or its principals. The government attempted to support these charges with an erroneous and convoluted Pinkerton argument. (Discussed infra.)

The remaining Counts 30 through 46 charge appellant and others with mail fraud. Each of the Counts 17 through 46 incorporate by reference the conspiracy allegations relating to the manner and means by which the alleged "scheme" was perpetrated.

The jury found appellant guilty on Count 29 (fraud in the sale of securities to one Allen Grant). Appellant was acquitted on the conspiracy charge (Count 1) and the remaining eighteen (18) securities and mail fraud counts.

2. Proof at Trial

At the time of trial only five of the original defendants remained, the bulwark of the government's case

consisting of the testimony of "cooperating" co-defendants. The government witnesses testified that appellant ZUBER had nothing, whatsoever, to do with the actual planning and execution of the manipulation of Pioneer stock. The testimony revealed that appellant did not enter the scene until almost one and one-half years after the scheme had been initiated. In fact, Judge McMahon commented during the sentencing that appellant's participation ". . . was on the periphery of the conspiracy, there is no doubt about that." (R.T. 14) Judge McMahon's comments, at best, were an overstatement of the prosecution's case as an analysis of the evidence will reveal. Even in the light most favorable to the government, the evidence pales when compared to the standards of proof to which the government must adhere.

Burney Acton testified that in 1969 he made arrangements to take control of the stock and records of Pioneer Development Corporation (R.T. 69), became secretary of the corporation, and was advised by defendant Scardino that defendant Segal could assist in obtaining financing for the corporation (R.T. 81). Shortly thereafter, in the summer of 1969, Acton, Clegg and Scardino met with Segal in Texas and discussed the fact that Pioneer had potentially valuable assets in the form of a mercury mine located in Nevada, and that Segal, if he desired, could raise money with the Pioneer stock (R.T. 82 - 86). At

another meeting in the fall of 1969, Segal indicated that he was interested in Pioneer, requested Acton to get all of the "paper work on the mine ready and up-to-date," and once this was done he'd collect the stock in Reno, Nevada, take it to New York, open trading, and then channel the proceeds from the trading of the stock into the mercury mine (R.T. 90). Segal stated that he wanted half of the stock to work with, that he would open the market in New York at $5.00 per share, and as long as none of the remaining stock was sold in the open market he would be able to make the price of the stock rise (R.T. 91, 117). Subsequently, approximately one-half of the issued and outstanding stock was transferred to Segal.

In November of 1969, Acton and Scardino discussed Scardino using some of the remaining stock to procure a loan (R.T. 118). It was specifically agreed between the aforesaid parties that the stock would not in fact be sold, but rather used as collateral for a loan. Stock was issued to Scardino for the purpose of collateralizing a loan, the proceeds of which were to go to Pioneer for the development of the mercury mine. Later Acton, Clegg and Segal learned that Scardino and an associate of his, McKibbon, had sold the stock instead of using it to collateralize a loan (R.T. 131). However, Scardino denied the fact that he had sold the stock, and insisted that he had in fact used it as collateral for a loan (R.T. 133).

A few days before Christmas, 1969, Segal contacted Clegg, who, in turn, contacted Acton, and advised him that the stock had in fact been sold on the West Coast and was depressing the market for the stock which Segal was making on the East Coast (R.T. 136 - 147). The record clearly reveals that up to this point Mr. ZUBER certainly had no contact with the case. Shortly thereafter, Acton testified Mr. ZUBER came to his home and asked him to accompany him and Finkelstein to Reno, Nevada, to get the stock situation straightened out (R.T. 149). Reno, Nevada, was Scardino and McKibbon's home. While on the flight to Reno, Acton claimed that he saw the butt of a gun in Mr. ZUBER's belt, although he stated that Mr. ZUBER did not threaten him (R.T. 220). When they arrived in Reno, Nevada, a meeting took place between ZUBER, Finkelstein, Acton, Scardino and McKibbon, in addition to "protection" brought by the latter party (R.T. 220). During this meeting, ZUBER allegedly said, we want to know who has been selling the stock. McKibbon denied selling the stock. A brief altercation ensued between McKibbon and Mr. ZUBER. Thereafter, McKibbon readily admitted to selling the stock and appropriating the proceeds. McKibbon immediately promised to repay the money he had obtained from its sale (R.T. 155, 216 - 219). ZUBER, according to Acton's testimony, stated that he wanted that money (R.T. 156). Acton further testified that the purpose of this trip was to

find out who had sold the stock and get the money returned (R.T. 220). Further, Acton stated that the purpose of ZUBER's trip was to get the money back from McKibbon's sale of the stock (R.T. 220). Acton further testified that there was no conversation or indication whatsoever as to why Scardino was not supposed to have sold the stock during Acton's contact with Mr. ZUBER.

Acton also testified that subsequent to this meeting, in early January, 1970, Finkelstein and Mr. ZUBER met with him and said they felt they could help him raise money for Pioneer if he came to New York. Acton admitted that he had touted Mr. ZUBER on the value of the mercury mine and its phenomenal possibilities. When in New York, Acton met with Finkelstein; Mr. ZUBER was not present (R.T. 158). A day or so later, Finkelstein took Acton to meet Allen Grant, a furrier who was interested in trading Pioneer stock for fur coats. Mr. ZUBER was present during this occasion (R.T. 159). It was agreed that 6,900 shares of Acton's stock would be traded for seven fur coats. Mr. ZUBER obtained an option from Grant to repurchase the stock in sixty days for $10.00 per share. At the time the stock was transferred to Grant, it was selling for $6.00 per share. Of the seven fur coats received, three went to Acton. The remainder being split between Mr. ZUBER and Finkelstein. Acton testified that Mr. ZUBER received nothing from him with respect to this transaction

but was supposed to receive a fur coat from Grant for helping to arrange the trade (R.T. 222).

On cross-examination, Acton testified that he in good faith believed the mercury mine belonging to Pioneer to have been an extremely valuable asset; that he had studied assay reports, geological surveys and feasibility studies on the mine, and that he had expressed to numerous people, including Mr. ZUBER, his belief that the mine was extremely valuable. Acton further stated thst the Howard Hughes organization had offered between five and ten million dollars for the mining claims owned by Pioneer (R.T. 224). Acton further testified that he never discussed his acquisition of Pioneer with Mr. ZUBER, nor did he ever discuss any of his conversations with Segal or Scardino with Mr. ZUBER (R.T. 215). In short, he stated that Mr. ZUBER had nothing to do with his arrangements with Scardino and Segal, and that he had never discussed those arrangements with Mr. ZUBER (R.T. 215 - 216).

Acton testified that he never discussed any of the objects of the conspiracy with Mr. ZUBER (R.T. 243), and that he did not intend to defraud anyone during the course of his dealings with Pioneer. When he was specifically asked whether he conspired with Mr. ZUBER to commit the object of the conspiracy, in the following question, "Did you ever agree with Mr. ZUBER to control many thousands of shares of stock never registered with the SEC in an

inactive shell corporation, namely Pioneer, then to establish an artificial market in the stock through manipulative devices, including quotes at arbitrarily selected prices, touting, giving assurances against loss and directing trades, and then finally to sell, pledge and distribute this unregistered stock at artificially high prices to purchasers and lenders in order to fraudulently obtain many hundreds of thousands of dollars at their expense?", Acton responded, "No sir." (R.T. 279 - 280) (Emphasis added.)

Michael Clegg, President of Pioneer, and a close associate of Acton, was called as a government witness, and basically substantiated Acton's testimony regarding the acquisition of Pioneer and the conversations with Segal and Scardino. He indicated Mr. ZUBER had nothing to do with the transaction in question until late December, 1969, well after the stock had been gathered, the trades directed, and the market made. Clegg testified that Mr. ZUBER was not present during, nor did he discuss with him any of the conversations which he had with Segal. Specifically, Clegg stated that he never discussed with him the conversation wherein he, Clegg, promised Segal that none of the stock left with himself and Acton would be sold since it would deflate the price of the stock once Segal commenced trading in New York (R.T. 415).

Clegg testified that prior to Mr. ZUBER accompanying

Acton to Reno, Mr. ZUBER met him at his home and stated that he represented Segal; that there was money owed Segal because stock had been sold and he was there to collect it (R.T. 452). Clegg testified that he telephoned Segal in Mr. ZUBER's presence, and asked what this was all about. Segal purportedly replied, a great deal of the stock had been sold and he wanted the proceeds (R.T. 456). Clegg stated he told Segal to go see Scardino, since he was the one who had the stock. Clegg claimed that he then turned the telephone over to Mr. ZUBER for confirmation that Scardino had the stock, and thereupon after a brief conversation between Segal and Mr. ZUBER, Mr. ZUBER left (R.T. 457). It is noteworthy that Clegg did not testify as to any discussions between he and Mr. ZUBER, or to which Mr. ZUBER was privy, wherein the reason the stock was not supposed to be sold was discussed. In fact, he testified that Mr. ZUBER did not say or do anything to indicate he knew why the stock was not supposed to be sold, and further Mr. ZUBER indicated to him that he was only there to collect money and nothing more (R.T. 482).

On cross-examination, Clegg testified his memory of those events, which occurred more than five years ago, was hazy and vague, and that he had failed to mention anything about Mr. ZUBER when he was interrogated by the SEC in 1970 and the grand jury in 1973 (R.T. 473 - 476). Clegg also testified that he believed in the mercury mine and, in

fact, moved his entire family to the mine site along with Acton's family so that they could direct its operation. In addition, Clegg testified that during his association with Pioneer he, too, never intended to defraud anyone (R.T. 487), and that he did not agree with Mr. ZUBER to further the object of the conspiracy.[2]

Joseph Azzerone testified concerning his activities in "making a market" for Pioneer on behalf of Segal. During the course of his entire testimony he did not mention Mr. ZUBER's name.

Michael Gardner, a former stock broker, was called as a government witness and testified to his relationship with Segal. Specifically, he testified to various directed trades in Pioneer stock by Segal, and that Segal had told him, people on the West Coast (Clegg, Acton, Scardino and McKibbon) were "treating him unfairly and robbing money from him" by selling stock in Pioneer which they were not supposed to sell, and cheating him with respect to a hotel he owned in Reno (R.T. 649). Gardner alleged that Segal asked him if he knew anyone who could "talk" to these people and resolve the problem. Gardner suggested Finkelstein, and a meeting was arranged between Finkelstein and Segal in New York in the middle of December, 1969. At that

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[2] It is noteworthy that the alleged means by which the conspiracy was carried out were incorporated by reference as the means by which the "scheme" alleged in each of the substantive counts was carried out.

meeting, Segal told Finkelstein, "A group of individuals in Nevada had . . . been stealing from him . . . and that he was looking for a way to get some of his money back and straighten out the problem . . . and . . . he wanted someone to go out there and sit down with them and try to straighten it out." (R.T. 651). Finkelstein then proceeded to Reno, Nevada, to set up a meeting to "get it straightened out."

The day before the meeting Finkelstein called Gardner at Segal's office and said he was in the process of gathering everyone together. Further, Finkelstein said he had brought Mr. ZUBER from California to help him (R.T. 653). Finkelstein told this to Gardner by telephone immediately after the meeting occurred, indicating that both sides had brought a lot of people in and that the problem had been resolved (R.T. 652). The testimony of Acton and Clegg clearly reveals that neither of them told Mr. ZUBER why the Scardino stock was not supposed to have been sold (i.e., that its sale on the West Coast would depress Segal's market on the East Coast), and Gardner's testimony clearly reveals that neither he nor Segal in his presence told Finkelstein or Mr. ZUBER why the Scardino stock was not supposed to have been sold.

In early January, 1970, Gardner testified that Mr. ZUBER came to New York and advised Segal of the outcome of the meeting in Reno. Gardner testified he was only

there for part of the conversation but he heard Mr. ZUBER tell Segal, "that the problem had been resolved. . . Howard was picking up some of the stock . . . no one was going to steal from Segal again . . . and that the meeting had been a very tough session." (R.T. 654 - 655, 657)

A few days later, in early January, 1970, Finkelstein met with Gardner and Segal advising him he was interested in buying his wife a fur coat. Gardner gratuitously suggested that Finkelstein trade stock for fur coats and directed him to a furrier by the name of Allen Grant, whom he had dealt with in the past (R.T. 656). Gardner called Grant and made arrangements for him to meet with Finkelstein.

According to Grant's testimony, Finkelstein met with him in early January, 1970, and brought Mr. ZUBER, Mrs. Zuber and Acton along (R.T. 768). Mr. ZUBER told Grant he was interested in exchanging Pioneer stock for fur coats. Grant was told that the stock was selling for about $6.00 per share and that it was felt it would go much higher. Grant verified this selling price with his broker. Mr. ZUBER allegedly told Grant that he would only make the trade of stock for fur coats if Grant would give him a sixty day option to repurchase the stock at $10.00 per share.[3] Grant testified that Mr. ZUBER said the Pioneer

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[3] Parenthetically, this stock belonged to Acton and not Mr. ZUBER.

Development Corporation was going to make a lot of money; that he expected the price of the stock to rise; and that was the reason he wanted the option to purchase the stock (R.T. 770). A day later Acton, the ZUBERs, and Finkelstein returned to Grant's place of business. Acton brought the stock certificates. Mr. ZUBER gave Grant the stock certificates, which comprised 6,900 shares, selling at $6.00 per share, having a value of approximately $42,000.00, in exchange for seven fur coats which Grant testified were worth only $15,000.00 (R.T. 774). Acton testified that he received three of the fur coats and the remainder were distributed between Finkelstein and Mr. ZUBER. Although the coats were only worth $15,000.00, Grant acknowledged that the receipt which he issued falsely claimed their value to be $42,000.00. Additionally, Grant's secretary prepared the option for Mr. ZUBER to purchase the stock in sixty days at $10.00 per share (R.T. 775 - the option appears in full at said page). Prior to consummating the trade, Grant again called his broker and verified that the stock was selling at $6.00 per share (R.T. 684). Further, Grant testified that before making the trade he was told that the mercury mine was valuable, but that it was not in operation as of then because they were waiting for a piece of equipment to make it operable (R.T. 786 - 787). During cross-examination Grant admitted he knew this was a very speculative adventure and further that he had

knowingly misrepresented the value of the coats and utilized the mails therewith (R.T. 789). When asked if he was aware of the fact that he had just admitted two elements of mail fraud, an objection was sustained to the question. When asked if he was told by the prosecution that he would not be indicted in this case, an objection to the question was again sustained (R.T. 789). Also, the court refused to allow the question, "Did (the prosecutor) ever tell you you were suspect in this case?" (R.T. 789)

## ARGUMENT

### I

### THE COURT'S REFUSAL TO GRANT A SEVERANCE IN ORDER TO ALLOW APPELLANT ZUBER TO UTILIZE THE HIGHLY EXCULPATORY TESTIMONY OF TWO CO-DEFENDANTS WHO REFUSED TO TESTIFY UNLESS A SEVERANCE WAS GRANTED IS PLAIN ERROR.

Since appellant was acquitted on the conspiracy count, and all but one of the many substantive counts, it is abundantly clear the jury had serious reservations concerning the extent and nature of Mr. ZUBER's culpability.

At the earliest stages of this proceeding, appellant brought to the trial court's attention the fact that a severance was mandatory in order for him to avail himself of highly exculpatory co-defendant testimony. The motion was raised once before trial and three times during the trial. On all but the last occasion, the Court denied the motion on the ground it was premature, perhaps thinking the co-defendants would take the stand and testify. On none of these occasions did the Court state the grounds averred in the motion were insufficient. On the last occasion, upon the resting of the defense case, which did not include any co-defendant testimony, the Court denied the motion on the grounds that an insufficient showing

had been made. A cursory analysis of the record and authorities reveals the Court's finding to be clearly erroneous; and the denial of the motion resulted in the denial of a fair trial. By affidavit of co-defendant Finkelstein and statements made by defense counsel in open court in the presence of Finkelstein and Segal, and their lawyers, a complete showing justifying a severance for Mr. ZUBER was made. The record reflects the following:

1. The explicit nature of Finkelstein and Segal's exculpatory testimony.

2. That Finkelstein and Segal would, in fact, testify on behalf of ZUBER if a severance were granted, and would not testify if a severance were denied.

Mr. Finkelstein's affidavit, which accompanied the motion for severance, stated:

"1. I am one of the defendants named in Case No. 74 CR 908 and a co-defendant of EDWARD ZUBER.

"2. I am scheduled to go to trial with Mr. ZUBER and others on December 2, 1974.

"3. I have discussed this matter with my lawyer and it is my intention <u>not</u> to testify in a joint trial. However, if a severance is granted, it is my intention to testify on behalf of Mr. ZUBER.

"4. I will testify that I introduced Mr. ZUBER to Pioneer Development Corporation; that I advised him the stock was free trading; that he and I discussed our belief that Pioneer was a valuable company with valuable assets; that at no time when I was present with Mr. ZUBER was there ever a discussion which would indicate the stock of Pioneer was being manipulated; that at no time when I was present with Mr. ZUBER was there a discussion of any fraudulent activities with respect to Pioneer; and that during the course of my contact with Mr. ZUBER, during the times alleged in the indictment, he demonstrated a state of mind which indicated Pioneer stock was legitimate and that the company was valuable and that he had no knowledge of any fraudulent activities with respect to the company.

"5. That based on my knowledge of this case Mr. ZUBER is innocent of the charges against him."

Defense counsel's affidavit was also included, which provided in pertinent part:

"2. Affiant has engaged in conversations with Mr. John Doyle, counsel for co-defendant Alan Segal,

"and is advised that Mr. Segal will not testify in a joint trial. However, if a severance were granted there is a strong likelihood Mr. Segal would testify on behalf of Mr. ZUBER.

"3. Affiant is informed by co-counsel that Mr. Segal would provide exculpatory testimony regarding Mr. ZUBER's connection with this matter.

"4. In affiant's judgment the aforesaid testimony of co-defendant Segal will be of vital importance to the presentation of Mr. ZUBER's defense in this matter."

Additional exculpatory co-defendant testimony was brought to the Court's attention at the close of the government's case when the motion for severance was renewed:

"MR. KIRSCHNER: At this time, Your Honor, we would move for a severance based upon the exculpatory testimony of co-defendants who are presently on trial, who have indicated that they will not testify in this matter. First --

"MR. DOYLE: Your Honor, if I may interrupt, I can represent to the Court that notwithstanding Your Honor's ruling -- and I appreciate Your Honor having ruled in favor of the motion that

"I made with respect to preclusion of prior convictions -- Mr. Segal will not take the stand in this case.

"MR. KIRSCHNER: Yes, Your Honor, I have had discussions with Mr. Doyle about that. Mr. Segal would testify if this matter were severed, and he would testify to this effect, specifically, that he had no conversations with Mr. Zuber until well after January 10th, which is the date of the transaction with Mr. Grant. In addition to that, he would also testify that he did not have a telephone conversation with Mr. Clegg or Mr. Zuber at Mr. Clegg's house in California.

"It would be his testimony that the conversation never occurred, that he was not in New York at that time, and did not have that conversation at all.

"In addition to that, Your Honor, we will also offer the testimony of the co-defendant Finkelstein. Mr. Finkelstein has indicated through his lawyer that he is not going to testify in the trial, but that he would testify if there were a severance granted. He is crucial; he is the link between Mr. Zuber and Mr. Gardner and Mr. Segal. [Emphasis added.]

"The testimony indicated that Mr. Gardner

"called Mr. Finkelstein, and then Mr. Finkelstein apparently got in touch with Mr. Zuber, that when he got in touch with Mr. Zuber, he stated to Mr. Zuber the following, that he had received a call from Gardner and that Gardner wanted him, Finkelstein, to collect some money from some people in Reno. That was all that was discussed, and that is what he told Mr. Zuber, that they were going to this meeting in Reno to collect some money. [Emphasis added.] In addition to that, he would testify that he had conversations with Mr. Zuber about the mine, and that he specifically told Mr. Zuber that the mine was very valuable, a valuable site, and he related to Mr. Zuber the information concerning the assay reports and all the favorable information concerning the mine.

"In addition, he would also testify that at the Reno meeting there were no threats and he would testify that Mr. McKibbon was being very evasive when Mr. Zuber asked him where the money was and what happened, that there were no guns. That would be his testimony with respect to that.

"He also indicated that he told Mr. Zuber that this stock did not have to be registered, that it was exempt under the grandfather clause. That would be his testimony, Your Honor, and on that basis we

"move for a severance for Mr. Zuber.

"THE COURT: I will reserve on the motion for the time being . . . I think your motion is premature . . ."

(R.T. 967 - 970)

Thereafter, Mr. ZUBER called no defense witnesses, and none of the co-defendants testified.

The expected testimony from the co-defendants, which Mr. ZUBER was denied, as a result of the denial of the severance motion, was crucial to his defense. First, Finkelstein, the link between ZUBER and the principals, would have indicated that he never told Mr. ZUBER the stock was not supposed to have been sold in the West because its sale would have the effect of depressing the market which Segal was making in the East. But, rather, they were going to this meeting in Reno for the sole purpose of collecting money for Segal. Also, at no time when Finkelstein was present with Mr. ZUBER was there a discussion of any fraudulent activities with respect to Pioneer. His testimony would also bolster Mr. ZUBER's good faith belief that the mercury mine owned by Pioneer was a very valuable asset and that if the mine was successful the price of the stock would go up, as Mr. ZUBER represented to Grant. Mr. ZUBER's belief in the mine, founded upon the representation made by Finkelstein, would support Mr. ZUBER's decision, based on innocent motives, to obtain the option from Grant to purchase

the Pioneer stock in sixty days at $10.00 per share.

The underlying question of guilty knowledge in this case turns upon whether or not Mr. ZUBER was aware of the reason the stock was not supposed to be sold when he went to Reno to retrieve money for Segal, and when he met with Grant and obtained an option to purchase the stock. Acton, Clegg and Gardner, the only witnesses who could have advised ZUBER, each testified that they did not advise him of that reason, nor was he present at any discussion of the reason the stock was not supposed to be sold in the West. Hence, if Mr. ZUBER possessed that incriminating information, he must have received it from either Finkelstein or Segal, his only other contacts in the case. As stated, supra, Finkelstein would have testified had he been given the opportunity, that he told Mr. ZUBER only that they were going to Reno to collect money and nothing more. Segal would have testified, had he been granted the opportunity, that he did not even speak with Mr. ZUBER until well after January 10, 1970, the date of the Grant transaction and Mr. ZUBER's last contact with Pioneer. Additionally, Segal would have testified that, contrary to the testimony of Clegg, he did not have a telephone conversation with Clegg while Mr. ZUBER was at Clegg's home. This would tend to undermine Clegg's credibility and support Clegg's admission that his memory was vague and hazy. Additionally, it would also eliminate another

situation from which it might be inferred that Mr. ZUBER obtained guilty knowledge. In short, Mr. ZUBER was denied the opportunity to put forth a defense rebutting any arguable inference that he had knowledge of fraudulent activities. It would also affirmatively establish that (1) Mr. ZUBER recognized the Pioneer stock to be legitimate and freely tradeable; (2) That Mr. ZUBER expressed his belief Pioneer was a sound company with valuable assets; and (3) Mr. ZUBER never mentioned anything concerning the stock being fraudulent or manipulated. Mr. ZUBER's defense required the testimony of co-defendants, and, of course, he could not compel them to testify in a joint trial, nor could he even have called them to the witness stand. The dilemma could only have been resolved if Mr. ZUBER were granted a severance.

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part that:

> "If it appears that a defendant is prejudiced by a joinder . . . of defendants in an indictment . . . or by such joinder for trial together, the Court may . . . grant a severance of defendants or provide whatever other relief justice requires."

The general interpretation of Rule 14 is that granting a severance is within the sound discretion of the trial

judge, and a conviction will be reversed only upon an abuse of that discretion. Opper v. United States, 348 U.S. 84, 75 S.Ct. 158 (1954).

> ". . . a district judge has the power to order a severance under Rule 14, Federal Rules of Criminal Procedure, and indeed has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." United States v. Vida, 370 F.2d 759 (6th Cir. 1966), cert. denied 387 U.S. 910.

The anticipated exculpatory testimony of co-defendants in the event of a severance makes a denial of severance "manifestly prejudicial" and reversible error. United States v. Ellsworth, 41 F.2d 864 (9th Cir. 1973); United States v. Martinez, 486 F.2d 15 (5th Cir. 1973).

The Courts have been quick to recognize that a severance is mandated where the moving defendant needs and will use the evidence of a co-defendant; this need is unlikely to be met in a joint trial; and "there is a substantially greater likelihood" that the evidence would be forthcoming if a severance were granted. United States v. Martinez, supra.

The record indicates that it was likely each of the co-defendants would refuse to testify where his own guilt

or innocence would depend upon his demeanor and credibility on cross-examination. In fact, this became a certainty when the defense rested without calling a single co-defendant. Of course, after the defense case the motion for severance was renewed.

The Fourth Circuit, in an opinion by Judge Sobeloff, United States v. Shuford, 454 F.2d 772 (4th Cir. 1971), wherein the convictions of a lawyer and his assistant for conspiracy in the knowing submission of false documents to the government were reversed where the assistant refused to testify on behalf of the lawyer out of fear that it would damage his chances of acquittal, stated:

> "The reported decisions support the proposition that a severance is obligatory where one defendant's case rests heavily on the exculpatory testimony of his co-defendant, willing to give such testimony but for the fear that by taking the stand in a joint trial he would jeopardize his own defense.
>
> " 'The leading exposition of this proposition is United States v. Echeles, 352 F.2d 892 (7th Cir. 1965). Echeles, a member of the Illinois Bar, was charged, together with two others, with suborning perjury, impeding the administration of justice and conspiracy. During the joint trial, it appeared that admissions

" 'previously made by Echeles' co-defendants would be introduced into evidence against him. Echeles contended that these admissions reflected unfairly on the question of his own guilt. Moreover, he asserted, other statements previously made by his co-defendants -- absolving him from any part in the wrongdoing -- would be admissible only if the co-defendants repeated them on the witness stand. Echeles moved for a severance on the ground that, since the Fifth Amendment prohibited him from calling his co-defendants to testify in his behalf, his only possible protection was through the grant of severance. The trial court denied the motion. The Seventh Circuit reversed, holding on these facts that denial of the severance so prejudiced Echeles' defense that a new trial was required. 'The denial of the severance prejudiced Echeles by preventing him from effectively countering one important element of the prosecution's case.' Similarly, in the instant case, rejection of the severance motion prejudicially denied Shuford the opportunity to present testimony highly relevant in the resolution of the issue of guilt or innocence." (At p. 776.) (Emphasis added.)

In the case at bar, it is painfully clear that the rejection of the severance motion prejudicially denied ZUBER the opportunity to present testimony highly relevant in the resolution of the issue of guilt or innocence. The manifest unfairness of the rejection of the severance motion is further underscored by Mr. ZUBER's acquittal on thirty of the thirty-one counts. Certainly, the jury should have heard the testimony of Finkelstein and Segal on behalf of Mr. ZUBER.

In Byrd v. Wainwright, 248 F.2d 1017 (5th Cir. 1970), the Court held that a failure to grant a severance where co-defendant testimony was needed amounted to a denial of due process. In so holding, the Appellate Court set forth several areas of inquiry when a trial court is presented with a motion to sever based upon the desire to offer exculpatory testimony of a co-defendant:

> "1. Does the movant intend or desire to have the co-defendant testify? How must his intent be made known to the Court, and to what extent must the Court be satisfied that it is bona fide?" (p. 1019)

It is clear from the record the defense desired to have co-defendant testimony. Formal testimony of defense counsel, under oath, or an affidavit from him, is not necessary, although it was supplied in this case. Byrd v. Wainwright, supra. The bona fides of the testimony

was not contested.

"2. Will the projected testimony of the co-defendant be exculpatory in nature . . .?" (p. 1019)

The exculpatory nature and significance of the co-defendants' testimony was clearly shown, supra pp. 20-25. Co-defendant testimony that Mr. ZUBER did not possess guilty knowledge is of primary importance, since guilty knowledge is the fundamental element the government was required to prove.

"3. To what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the co-defendant will testify?" (p. 1019)

The affidavits and statements of counsel in open court indicated that the co-defendants would testify on behalf of Mr. ZUBER if a severance were granted.

"4. What are the demands of effective judicial administration in economy of judicial effort? Related to this is the matter of timeliness in raising the question of severance." (p. 1019)

The economy of judicial effort must be weighed against the manifest prejudice of a joint trial. Any judicial economy is far outweighed in the face of the following: (1) a separate trial would have been a relatively short

matter, since ZUBER was at best only a secondary defendant; (2) the defense agreed to stipulate to much of the evidence if a severance were granted; (3) the full blown trial with all of the defendants lasted less than seven days; (4) most important, a severance was the only way ZUBER could present the exculpatory testimony. As to the timeliness of the severance question, the motion was raised on the first occasion the Court permitted written motions, and orally thereafter at each appropriate juncture of the trial.

> "5. If a joint trial is held, how great is the probability that a co-defendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation?" (p. 1020)

None of the co-defendants pled guilty on the eve of trial.

The record echoes the fact there was little more that Mr. ZUBER could have done to demonstrate his right to a severance. Certainly a sufficient showing for severance was made on at least four separate occasions during the course of the proceeding.

A strikingly similar issue was raised in United States v. Martinez, supra. The key question presented was whether the defendant had guilty knowledge, and the only available

means of proving his innocence was through co-defendant testimony. The Court concluded:

> "The question then is whether depriving 'one defendant of the opportunity to use the exculpatory testimony of a co-defendant amounts to "prejudice resulting in the denial of a fair trial." Byrd v. Wainwright, supra, was a state habeas corpus case, governed by Fourth Amendment due process considerations rather than by corresponding relief from prejudicial joinder provisions of Rule 14. But the criteria are similar, and in Byrd this circuit was presented with the opportunity to consolidate and catalogue our prior rulings for the guidance of trial judges confronted with motions for severance based on a desire to offer exculpatory testimony of a co-defendant. Byrd set forth the following guidelines: (i) the movant should "show the testimony would be exculpatory in effect"; we caution that such a showing would not require the equivalent of a statement under oath by the co-defendant whose testimony was sought, op. cit. at 1012; Smith v. United States, supra, at 38; (ii) the movant should show to the Court's satisfaction

that the co-defendant will in fact testify; in this respect we caution that the inquiry is not as to certainty whether the co-defendant will or will not testify, but the likelihood; op. cit. at 1022; Smith, supra, at 38; and (iii) we indicated that the trial judge might properly consider the exculpatory nature and the significance of the desired testimony to the movant's defense, which might be restated in terms of the extent of potential prejudice to the defendant if the defendant is tried without the opportunity to elicit the co-defendant's testimony. Op. cit. at 1020; United States v. Echeles, supra.

"There appears to be little doubt that conditions (i) and (ii) above were satisfied in the present case. Counsel for Martinez and Huila made the following statement to the court as to Martinez planned testimony when he renewed the severance motion during the trial at the close of the government's case in chief: '. . . the defendant Martinez, if he were severed from this trial, would testify on behalf of defendant Huila and exculpate him from any involvement in the matters which Huila is charged with. But

'under the circumstances, he cannot take the stand because he is a defendant and will only inculpate himself.'

"The importance of Martinez' exculpatory testimony to Huila's defense is apparent. The crucial question as to Huila was whether he had knowledge, either of the plan to import the marijuanna, or that the package which he took . . . and placed on the dock actually contained marijuanna. Martinez was the only individual other than Huila himself in a position directly to rebut the government's circumstancial evidence of Huila's knowledge of these facts." (At p. 22.)

The crucial question, in the instant case, as in the Martinez case, was whether or not the defendant had guilty knowledge. As in the Martinez case, the only individual other than the defendant ZUBER himself in a position directly to rebut the government's circumstancial evidence of his guilty knowledge was his co-defendants Finkelstein and Segal.

II

THE EVIDENCE ADDUCED DURING THE TRIAL WAS INSUFFICIENT TO DEMONSTRATE THAT APPELLANT WILLFULLY JOINED THE ALLEGED SCHEME WITH KNOWLEDGE OF ITS MEANS AND PURPOSES.

Appellant was convicted on Count 29, with respect to which the Court instructed:

"The government must prove . . . the following elements:

"1. The existence of a scheme or artifice to defraud in the manner charged in the indictment and in connection with the sale or offer to sell Pioneer stock.

"2. That the defendant devised or intended to devise the scheme charged in the indictment or aided, assisted, joined, associated or participated in the scheme, knowing its means and purposes [emphasis added].

"3. That the defendant used or caused to be used the mails . . . " (R.T. 1267)

In Count 29 the government incorporated by reference the means by which the alleged conspiracy was carried out as the "means" by which the alleged scheme was carried out. However, the indictment does not describe what the alleged scheme was, nor was that matter clarified by a bill of particulars.

In any event, the evidence did not demonstrate that appellant willfully participated in the scheme with knowledge of its means and purposes. Viewing the evidence in a light most favorable to the government, all that can be said is Mr. ZUBER was aware when he attended the Reno meeting, and met with Grant, that the Scardino stock was not supposed to have been sold. Not a single witness testified that Mr. ZUBER was aware of why that stock was not supposed to be sold (i.e., because it would depress the artificial market Segal was allegedly creating in New York). In fact, each witness testified Mr. ZUBER's sole concern was with who had the proceeds from the sale of the stock, and not the reason the stock was not to be sold. Unless Mr. ZUBER was aware of why the stock was not supposed to have been sold, he could not have had knowledge of the aims and purposes of the scheme. The alleged purpose being Segal's attempt to manipulate the price of the stock by controlling the quantity of free-trading stock on the open market.

Acton testified Mr. ZUBER came to his home, accompanied

him to Reno, Nevada, stating, "We got to get the stock situation straightened out." (R.T. 149) --- "Somebody has been selling the stock." (R.T. 155) At the Reno meeting, McKibbon admitted to being the one selling the stock and promised to repay the money from its sale (R.T. 155). Additionally, Mr. ZUBER said, "He wanted it straightened out, wanted the money." (R.T. 156); and ZUBER's interest, "was to get the money back." (R.T. 220) There is nothing which may be gleaned from Acton's testimony which would indicate that Mr. ZUBER was aware of why the stock was not supposed to have been sold. In that same vein, Acton testified:

"Q: When you engaged in your conversations with Mr. Segal, any conversations, did you ever tell Mr. Zuber about those conversations?

"A: No, sir.

"Q. When you gave Mr. McKibbon and Mr. Scardino the block of stock for the purposes of a loan, did you tell Mr. Zuber about that?

"A. No, sir.

"Q. When you gave Mr. Segal the stock which you testified you had given him, did you tell Mr. Zuber about that?

"A. No, sir." (R.T. 215)

Clegg's recollection of the events is even more exculpating. He recalls his meeting with ZUBER in the following manner:

> "I was walking out of my house . . . and I met Mr. Zuber right outside . . . he said he was representing Mr. Segal, that there was money owed Mr. Segal because the stock had been sold and that he was there to collect the money for it." (R.T. 452)

When Clegg allegedly immediately called Segal, that portion of the conversation which ZUBER heard went as follows:

> "There is somebody here that wants some money about stock --- what is this all about?" (R.T. 456)

With respect to Mr. ZUBER's lack of knowledge of the alleged scheme, Clegg was asked:

> "Q. . . . Going back again to your meeting with Mr. Zuber in between December, 1969, and New Years, is it correct, sir, that Mr. Zuber did not say anything to indicate he knew why the stock was not supposed to be sold?
>
> "A. No, he was not concerned with anything,

"except where the money was." (R.T. 482)

(Emphasis added.)

Along this same line, Clegg testified ZUBER was never present during his conversations with Acton, Segal, Scardino, nor did he ever discuss these conversations with Mr. ZUBER. (R.T. 476 - 479)

Gardner's testimony does not attribute guilty knowledge to Mr. ZUBER either. In fact, he testified he called Finkelstein to assist Segal in straightening out the "problem," and Finkelstein without Gardner's or Segal's knowledge contacted ZUBER to assist him at the Reno meeting. (R.T. 653) Concerning the alleged meeting between Segal and ZUBER in January, 1970, Gardner recalls, "Zuber explained to Mr. Segal that the problem had been resolved . . . and that no one was going to steal from Segal again because the situation was now under control." (R.T. 654) (Emphasis added.) Nothing in Gardner's testimony indicated ZUBER knew the reason the stock was not supposed to have been sold in the West.

It is abundantly clear from each of the government's own witnesses that Mr. ZUBER was not aware of why the stock was not supposed to be sold in the West, and was concerned only with retrieving the money from the unauthorized sale of the stock. It is apparent Mr. ZUBER also thought that the money belonged to Segal. In short, there is not a

scintilla of evidence, either direct or circumstancial, to indicate Mr. ZUBER had knowledge of the scheme not to sell the stock on the West Coast because it would depress the price of the stock on the East Coast. Common sense dictates that the principals who allegedly concocted this scheme would not advise Mr. ZUBER of their plan. If they did so, they would have created another witness against themselves. ZUBER was retained to collect money; there was no cogent reason for them to tell him of their plans.

Grant testified he met ZUBER, Acton and Finkelstein on about January 10, 1970, and traded seven fur coats for 6,900 shares of Acton's Pioneer stock. He testified Mr. ZUBER told him it was a good stock and would go very high (R.T. 769); and that ZUBER wanted an option to purchase the stock for $10.00 per share for sixty days (R.T. 775). Grant's secretary, at Grant's direction, drew up the option (R.T. 772).

Nothing in the transcript demonstrates Mr. ZUBER knowingly and willfully made any misrepresentations whatsoever. Clegg and Acton both testified they told Mr. ZUBER the mercury mine was fabulously valuable, with tremendous potential. In fact, Acton testified the Howard Hughes organization had offered between five and ten million dollars for the mine. Hence, the only evidence in the record relating to Mr. ZUBER's state of mine with respect to the potential value of the Pioneer stock supports his good faith belief in

the representations he made to Grant to the effect that the stock was valuable and its price would rise. Again, the question of why Mr. ZUBER exacted an option from Grant is answered by the evidence in the same manner. Mr. ZUBER was told Pioneer owned a valuable mercury mine, which, when put in full operation would cause the price of the stock to rise. Grant testified that before acquiring the stock he was aware that the mine was not then in operation (R.T. 786). The option offered Mr. ZUBER an opportunity, at no cost, to purchase the stock from Grant if the price rose beyond $10.00 per share. Grant knew if the price did not reach more than $10.00 per share, Mr. ZUBER was not obligated to, and would not, exercise the option. Grant was not lulled or induced into this transaction by thinking that Mr. ZUBER had guaranteed to purchase his stock at $10.00 per share. If the government contends the option demonstrates circumstantially that ZUBER knew the stock was not supposed to be sold, the response simply is, it does not make any difference. First, merely knowing the stock was not supposed to be sold is not sufficient guilty knowledge. The government was required to prove that Mr. ZUBER had knowledge of why it was not supposed to be sold. The record is void of any such evidence. Further, the option was not an agreement not to sell the stock. It simply gave Mr. ZUBER the right to purchase the stock within sixty days. If the option was not exercised in sixty days, Grant was free to sell the

stock.

For the foregoing reasons the evidence was insufficient to establish Mr. ZUBER's culpability for the crime charged.

III

THE TRIAL COURT'S IMPROPER RESTRICTION OF CROSS-EXAMINATION OF PROSECUTION WITNESSES DEPRIVED APPELLANT OF HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION.

Although the scope and extent of cross-examination of witnesses is within the sound discretion of the trial court, United States v. Minuse, 142 F.2d 388, 389 (2d Cir. 1944), cert. denied 323 U.S. 716 (1944), the court may not limit cross-examination so that the effect is to prevent bringing out matter material to the issues. Dixon v. United States, 333 F.2d 348 (5th Cir. 1964); Dickson v. United States, 182 F.2d 131 (10th Cir. 1950).

The Supreme Court has recently addressed itself to a problem similar to that in the instant case. In Davis v. Alaska, 94 S.Ct. 1105 (1974), the trial court restricted defendant's cross-examination of a key witness against him (the Court attempted to preserve the state's interest in maintaining secrecy of the witness' juvenile proceedings). As a result, defendant was unable to cross-examine the witness regarding his status with the government, and to thereby explore the witness' motivation and bias. The Supreme Court reversed, stating, at 1110:

"We have recognized that the exposure of a

"witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496. . . (1959)."

In the instant case, appellant's counsel attempted to cross-examine the witness Allen Grant in an effort to explore his motivation and/or bias. Grant was a crucial witness for the prosecution. It was the transaction with him, in which appellant acted as a finder in a trade of 6,900 shares of Burney Acton's stock for overvalued furs, for which appellant was convicted (Count 29). After having testified to facts tantamount to mail fraud by himself, the witness was asked repeatedly about his conversations with the prosecution, including whether he was told he would not be prosecuted and whether he had ever been told he was a suspect (R.T. 789). In each instance, the prosecution's objection was sustained by the trial court (R.T. 789). As in Davis, supra, we cannot speculate as to whether appellant's counsel would have made inroads into the witness' credibility had counsel been permitted to explore the area. However, also as in Davis, the jurors were entitled to hear that testimony so that they could make an informed judgment on the weight to give that "crucial" witness' testimony. Davis, supra, at 1111. The issue of bias which appellant's counsel sought to explore

was clearly admissible in order to afford a basis for an inference of undue pressure because of Grant's vulnerable status as a potential defendant. Davis, at 1111; Alford v. United States, 282 U.S. 687, 51 S.Ct. 218 (1931). Accordingly, the denial of effective cross-examination is a "constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it." Davis, supra, at 1111; Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245; Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750 (1968).

Additionally, the trial court abused its discretion in restricting cross-examination of the witnesses Burney Acton and Michael Clegg on the issue of their state of mind relevant to any alleged "agreement" they may have had with the appellant ZUBER. Acton and Clegg served as President and Secretary of Pioneer Development Company. Appellant's counsel repeatedly attempted to explore -- in the language of the indictment -- whether those witnesses had agreed with appellant to do certain acts alleged in the indictment (R.T. 487; 490-492; 215; 243-244). These efforts to explore the appellant's involvement with the two "cooperating" co-defendants were repeatedly restricted by the trial court's rulings. Consequently, the jury was not afforded the opportunity to hear the testimony of two key witnesses regarding what they believed their agreements, if any, were with appellant.

The combined effect of these restrictions was overwhelming to appellant. The two key conspirators could not be heard on whether they believed they had agreed with appellant to perform certain acts, as alleged in the indictment; and the most crucial witness against appellant was prevented from testifying as to his discussions with the prosecution relating to his possible motive and bias. Accordingly, the trial court abused its discretion in preventing appellant's counsel from bringing out matter material to the issues, in violation of appellant's Sixth Amendment right of confrontation. Davis, supra; Dixon, supra; Dickson, supra.

IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE PREJUDICIAL AND INFLAMMATORY SURPLUSAGE IN THE INDICTMENT.

In the midst of a complex scheme describing in detail the machinations of a complicated securities fraud, the indictment alleges, at paragraph 4, that, "At all times mentioned herein the defendant Zuber. . .[was] not regularly employed." The most cursory examination of the indictment shows that allegation to be wholly irrelevant to the scheme alleged therein, and clearly prejudicial to appellant. That it served no purpose is apparent from the manner in which the prosecution dealt with the issue.

Appellant, by written motion filed on November 12, 1974, moved to strike the language on the grounds that it was irrelevant, inflammatory and prejudicial; that is, its sole function was to impart to the jury the fact that appellant was not "gainfully" employed. The government responded by written affidavit, in which the Assistant United States Attorney, stated:

> "As to the allegation that Zuber was not regularly employed, this statement in the introductory position of the indictment will be supported by proof at trial and thus cannot be inflammatory. In the

"event that no proof supports this allegation, it may be striken [sic]." Paragraph 10, Affidavit in Opposition to the Motions of the Defendant Zuber.

The government thus indicated that the allegation was a material portion of its proof to be adduced at trial, and that a failure of proof would result in its removal of consideration by the jury.

The indictment alleges Mr. Zuber to have participated in a period of illegal activity from August 1, 1968, through December 31, 1970, a period of 883 days (see Count 1). At trial, the government presented evidence of Mr. Zuber's actions on approximately four days. All four of those days were between the period of approximately Christmas, 1969, through January 10, 1970 -- about two weeks.

Accordingly, at the close of the case, there being a failure of proof, appellant again moved to have this allegation stricken from the indictment. The government responded by pointing out -- correctly -- that the allegation was incorporated by reference into each count of the indictment. In support of its position, the prosecutor erroneously shifted the burden of proof to the defendant by stating that there had been no evidence presented to establish that the appellant was regularly employed. Furthermore, the trial court accepted the prosecutor's position that the evidence

of appellant's activities during less than two weeks of time was sufficient to support the allegation that at "all times alleged in the indictment," appellant was not regularly employed (R.T. 974 - 975). The error thus appears to be twofold. First, the prosecutor, with the apparent concurrence of the trial court, erroneously shifted the burden of proof. Second, there was a total failure of proof in support of that allegation. The mere suggestion that appellant's contacts with other defendants over a period of a few days somehow supports the broad allegation in the indictment is absurd on its face. As a consequence, the indictment was read to the jury with the allegation intact. It remained at the end as it was in the beginning: irrelevant, prejudicial and inflammatory. Whether appellant was "regularly employed" at <u>any</u> time has no conceivable bearing on the allegations of stock manipulation in this case.

A motion to strike such surplusage should be granted if: (1) it is clear that the allegations are not related to the charges; <u>or</u> (2) if the allegations are inflammatory and prejudicial. <u>Dranow v. United States</u>, 307 F.2d 545, 558 (8th Cir. 1962); <u>United States v. Archer</u>, 355 F.Supp. 981, 989 (S.D.N.Y. 1972); <u>United States v. Ahmad</u>, 329 F.Supp. 292, 297 (M.D. Pa. 1971). In this case, <u>both</u> elements are present. Consequently, the offensive language should have been stricken. In a close case such as this one, in which appellant was acquitted of every count but one, it is very likely that such

a prejudicial allegation may well have been the one that tipped the scale against appellant.

V

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO DISMISS THE INDICTMENT FOR LACK OF SPEEDY PROSECUTION.

This case involves a total pre-indictment and post-indictment delay of approximately four years. Accordingly, on November 12, 1974, appellant moved to dismiss the indictment for lack of speedy prosecution, seeking relief under Rule 48(b), Federal Rules of Criminal Procedure, and the Fifth and Sixth Amendments to the United States Constitution. Without hearing or written opinion, that motion was denied. As the trial progressed, it became apparent that the "due diligence" file maintained by the principals of Pioneer Development Corporation during a crucial period of time in the indictment had been lost or destroyed in the four year interval. That file would accurately reflect the defendants' intentions -- be they fraudulent or honest. Accordingly, the motion was renewed at the end of the trial, and again denied (R.T. 967).

In order to avoid repetition, this Court's attention is respectfully directed to appellant's Motion to Dismiss for Lack of Speedy Prosecution, filed on November 12, 1974. That motion discusses thoroughly the substantive and procedural requirements that compel reversal and dismissal of the

indictment. Because of the inordinately long delay and the prejudice inherent therein, the failure of the government to explain the delay, and the fact that the appellant was in no manner responsible for the delay, the trial court should have shifted the burden to the prosecution to establish, if possible, that the reason for the delay was of sufficient importance to justify the time lost. Dickey v. Florida, 398 U.S. 30, 56 (1970); United States v. Wahrer, 319 F.Supp. 585 (D. Alas. 1970); United States v. Blanca-Perez, 310 F.Supp. 550 (S.D.N.Y. 1970).

Although appellant contends he has no obligation to show actual prejudice under the circumstances of this case (see Memorandum of Points and Authorities in Motion to Dismiss and cases cited therein), that issue was brought more sharply into focus as the trial progressed. Should prejudice be required, it was established at trial in two ways. First, all counsel repeatedly needed to refresh the faded memories of witnesses. Second, and more important, the lapse of time was responsible for the loss of the "due diligence" file maintained by the principals of Pioneer Development Corporation (R.T. 967). That file would have accurately reflected the defendants' intentions -- be they fraudulent or honest. Appellant was deprived the opportunity to have the jury consider this evidence because of the inordinate time lapse. The trial court should have required the prosecution to justify the lapse. Dickey, supra;

Blanca-Perez, supra; Wahrer, supra.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction be reversed.

Respectfully submitted,

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STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within above entitled action; my business address is 10844 Ventura Boulevard, North Hollywood, California. On June 30, 1975, I served the within

Brief of Defendant-Appellant, Edward Zuber (No. 75-1154)

on the persons interested in said action by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States post office mail box at North Hollywood, California, addressed as follows:

John S. Siffert, Esquire
Assistant United States Attorney
United States Courthouse
Foley Square
New York, N.Y. 10007 (2 copies)

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 1975 at North Hollywood, California.

Esiquia Gonzales

Esiquia Gonzales